IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9032 of 2002

with

SPECIAL CIVIL APPLICATION Nos. 5686 of 2002
11982 of 2002, 12423 of 2002, 419 of 2002, 259 of 2003, 231 of 2003, 7941 of 2001, 8078 of 2001, 7715 of 2001 and 8469 of 2002.

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SONA COOPERATIVE HOUSING SOCIETY LIMITED

Versus

GUJARAT ELECTRICITY BOARD

Appearance:

1. Special Civil Application No. 9032 of 2002
Mr. S.B.Vakil, Sr. Advocate with MR VIJAY H PATEL
for the Petitioner in all petitions.
Mr. Suresh N Shelat, Sr. Advocate for MS LILU K BHAYA
for the Respondent No. 1.
MR DG CHAUHAN for Respondent No. 2
Mr. R.M.Chauhan, ASSTT. GOVERNMENT PLEADER
for Respondent No. 3..

2. Special Civil Application No. 5686 of 2002

MR TUSHAR MEHTA for the Petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms. Lilu K Bhaya,
for the respondents.

3. Special Civil Application no. 11982 of 2002
Mr. Z.F.Bharda for the petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms. Lilu K Bhaya
for the respondents.

4. Special Civil Application no. 12423 of 2002
Mr. Z.F.Bharda for the petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms. Lilu K Bhaya
for the respondents.

5. Special Civil Application no. 419 of 2002
Ms. Sudha Gangwar for the petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms. Lilu K. Bhaya
for the respondents.

6. Special Civil Application no. 259 of 2003
Mr.S.A.Qureshi for the petitioner.
Mr. S.Shelat, Sr. Advocate with Ms. Lilu K. Bhaya
for the respondents.

7. Special Civil Application no. 231 of 2003
Nanavati Associates for the petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms. Lilu K Bhaya
for the respondents.

8. Special Civil Applicationno. 7941 of 2001
Mr. Hasim Qureshi for the petitioner.
Mr.S.N.Shelat, Sr. Advocate with Ms. Lilu K. Bhaya
for the respondents.

9. Special Civil Application no. 8078 of 2001
Mr. Hasim Qureshi for the petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms. Lilu K Bhaya
for the respondents.

10. Special Civil Application no. 7715 of 2001
Mr. R.S.Sanjanwala for the petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms. Lilu K Bhaya
for the respondents.

11. Special Civil Application no. 8469 of 2002
Mr. R.M.Chhaya for the petitioner.
Mr. S.N.Shelat, Sr. Advocate with Ms.Lilu K Bhaya
for the respondents.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 19/06/2003

CAV JUDGEMENT

In all the aforesaid petitions, since the validity of clause/condition 2(j) of Conditions and Miscellaneous Charges for Supply of Electrical Energy (hereinafter referred to as "the Conditions of Supply")

has been challenged either directly or indirectly, hence all these petitions are being disposed of by this common judgment.

2. In Special Civil Application no. 9032 of 2002, it has been averred that Visnagar Co-operative Spinning Mills Ltd. went in liquidation and a final order of liquidation was passed. Pursuant to the order of liquidation, Liquidator was appointed and the Liquidator started exercising statutory powers conferred under sections 107 to 115 of the Co-operative Societies' Act, 1961. There were several creditors of Visnagar Co-operative Spinning Mills Ltd. whose dues were outstanding against the said mills. There were also dues of workers running into crores of rupees against the said mill. A petition being Special Civil Application no. 1178 of 1988 was filed in this Court. By an order dated 20th September, 1999, this Court directed for the disposal of the assets of the mill company by a committee under the Chairmanship of the Commissioner, Kutir Udyog for satisfying the dues of secured creditors, workers and other creditors including the dues of the Government and some Government organisations. Under the order, a committee was constituted for the disposal of the assets of the aforesaid mill. A tender notice was issued on 18th September, 2000. As the offer of the petitioner society was the highest and that offer was accepted and hence a registered sale deed was executed by the Liquidator on 4.4.2001 and that was registered in the office of Sub-Registrar on 30th June, 2001. The petitioner made complete payment of Rs. 13.25 crores to the Liquidator. The petitioner society demolished the superstructure standing on the land and constructed complete new shops cum residential units on the said land. After making a substantial investment and after completing necessary legal formalities, the petitioner society applied for temporary connection of electricity to the respondent no.1 Board for making fresh construction. A temporary connection was given to the petitioner after the petitioner paid the estimate on 16.3.2001. When the new construction was made, the petitioner made an application for a new connection, for the supply of electricity to the petitioner society, the petitioner was required to deposit the entire dues of the previous owner by GEB. The Joint Director, Kutir Udyog by his letter dated 14.9.2001 made it clear to Gujarat Electricity Board that the dues of the GEB were to be claimed from the Liquidator and the auction purchaser was not liable for the dues of GEB and recommended for giving a fresh regular electricity connection to the petitioner society. Accordingly, the respondent Board made a claim

of Rs. 5,75,57,299.27 ps. Out of the aforesaid total claim of the GEB, a proportionate sum of Rs. 2,23,80,443.00 were paid towards GEB's claim on 17.11.2002. The Chief Engineer of GEB informed the Superintending Engineer(O and M) of GEB, Mahesana that the competent authority has directed to recover arrears first and then to release the connection to the petitioner. The Deputy Engineer of the respondent GEB by an order dated 16th March, 2003 intimated the petitioner that its temporary connection would be disconnected. When the petitioner applied for a regular connection of the electricity on 20th April, 2002 to the respondent Board, the Board asked the petitioner society that unless the petitioner clears the dues of previous owner Visnagar Co-operative Spinning Mills Ltd., the petitioner society would not be entitled for a fresh connection. Since then the respondent Board has not issued a regular electricity connection as required by the petitioner society inspite of various representations made to various authorities beginning from the liquidator to the Chief Minister of the State. The petitioner has already paid the entire amount of consideration of Rs. 13,25 crores in a public auction for the purchase of the assets of the previous owner and approximately 50% of the amount is still lying with the State Government and the Government has to appropriate that amount as per the priorities of the creditors in accordance with law. The remaining amount is to be disbursed amongst creditors. GEB has no right to insist for the payment from the petitioner society and challenged the action of the Board in not giving a fresh regular electricity connection to the petitioner and the petitioner has also challenged the condition no. 2(j) of the Conditions of Supply in the present petition.

3. The respondent no.1 Board has filed affidavit-in-reply wherein it has been stated that it is immaterial that the petitioner has purchased the property in a public auction. The condition no. 2(j) is a statutory condition and for getting connection it is necessary for the petitioner to comply with the said condition. It is denied that the respondent Board has acted contrary to the provisions of The Indian Electricity Act, 1910 (hereinafter referred to as "the Act"), The Electricity (Supply) Act, 1948 (hereinafter referred to as "the Supply Act", The Indian Contract Act and The Co-operative Societies' Act. It is also denied that condition no. 2(j) is unconstitutional and violative of Articles 14, 19 and 21 of the Constitution of India. The petitioner is liable to pay the dues of the earlier consumer as per condition no. 2(j) of the Conditions of Supply. The letter dated 29th November,

2000 of the Liquidator will have no implication on the demand of the respondent Board. The proceeding which the respondent Board is required to take as per the Company law or as per Co-operative Societies Act cannot prevent the respondent Board from enforcing and implementing the condition no. 2(j) of the Conditions of Supply. The petitioner applied for a regular connection on 20th April, 2002 and the petitioner was informed that unless it clears the dues of the earlier owner, the petitioner would not be entitled to a fresh connection as per condition no.2(j) of the Conditions of Supply. The earlier owner was in arrears of GEB itself for a sum of Rs. 3,51,64,857.84 ps. being Board charges (including delayed payment charges upto 1.7.1998) + Electricity Duty of Rs. 2,04,85,943.42 ps. + Rs. 19,06,498.01 ps. towards tax on Sale of Electricity, the total being Rs. 5,75,57,299.27 ps. The ratio laid down by the Supreme Court in the case of Isha Marble will not come in the way of the respondent Board for its claim as at the relevant time, condition no. 2(j) was not in existence and that decision of the Supreme Court would not be applicable to the case of the petitioner society. As per the decision of the Supreme Court reported in 1983, SCC, 1296, the tariff would equally apply to the "security" that being a condition for the contract of supply. The Supreme Court has held in the case of M/s. Hyderabad Vanaspati Ltd. vs. APSEB reported in 1998(4) SCC, 470 that the terms and conditions of supply of electricity by the Board are statutory. Even in absence of individual contract such terms and conditions of supply will be applicable to all the consumers and he will be bound by them. In the case reported in AIR 1998, Kerala, 343 wherein before Kerala High Court, the premises in question was purchased in a public auction and connection in the same premises was disconnected for the non-payment of the arrears by the previous occupier and for reconnection the applicant had applied. But the Board had refused on the ground of non-payment of arrears of the previous owner. For reconnection, the applicant had applied, but the Board had refused on the ground of non-payment of arrears. The Kerala High Court has held that it is not illegal since the Board has a legal right under Regulations to recover the amount from the new customer. The ratio of Isha Marble's case has been distinguished by the Kerala High Court saying that this condition to recover the dues of the earlier consumer has been amended and is a part of terms and conditions for the supply which was not in earlier case before the Supreme Court. The Kerala High Court in the case reported in AIR 2001, Kerala, 380 has held that denial by the Board to supply electrical energy to premises where there are arrears due to non-payment by

the occupier in accordance with regulations of the Board cannot be said to be illegal or arbitrary.

4. Affdiavits have already been exchanged.
Heard the learned Senior Advocate Mr. S.B.Vakil and other advocates for the petitioners and the learned counsel for the Official Liquidator and learned Advocate General on behalf of the respondent Board as well as the State of Gujarat at length.

5. The arguments advanced by the learned
Senior Counsel Mr. Vakil have been adopted by some other learned counsel and some learned advocates for the petitioners in other petitions have been heard.

6. In all these petitions, the validity of
condition 2(j) of the Conditions of Supply has been challenged on various grounds. The said condition reads as under:

"2(j) Recovery of old dues :
Reconnection or new connection for any premises, where there are arrears of the Board pending from the consumer/occupier, shall not be entertained. The new successor/occupier has to clear these dues of the previous consumer before the application of successor/occupier is processed for supply of electricity. If the Board, at a later date, gets the full or part of these dues from the previous consumer, the amount shall be refunded to the successor/occupier after adjusting the costs including legal expenses to recover such arrears and the refund shall bear no interest."

It is submitted that the Board has no power to frame regulations in respect of the terms and conditions which are not covered under clause VI of the schedule of Indian Electricity Act, 1910 which is described as under:

"VI. Requisition for supply to owners or occupiers in vicinity- (1) Where (after distributing mains have been laid down under the provisions of Clause IV or Clause V and the supply of energy through those mains or any of them has commenced) a requisition is made by the owner or occupier of any premises situated within (the area of supply) requiring the licensee to supply energy for such premises, the licensee shall, within one month from the making of the requisition (or within such longer period as the (Electrical Inspector) may allow) supply, and save

in so far as he is prevented from doing so by cyclones, floods, storms or other occurrences beyond his control, continue to supply, energy in accordance with requisition:

Provided firstly, that the licensee shall not be bound to comply with any such requisition unless and until the person making it-

(a) within fourteen days after the service on him by the licensee of a notice in writing in this behalf, tenders to the licensee a written contract, in a form approved by the (State Government) duly executed and with sufficient security, binding himself, to take a supply of energy for not less than two years to such amount as will (assure to the licensee at the current rates charged by him, an annual revenue not exceeding fifteen per centum of the cost of the service-line required to comply with the requisition), and

(b) if required by the licensee so to do, pays to the licensee the cost of so much of any service-line as may be laid down or placed for the purposes of the supply upon the property in respect of which the requisition is made, and of so much of any service-line as it may be necessary for the said purposes to lay down or place beyond one hundred feet from the licensee's distributing main, although not on that property;

Provided secondly, that the licensee shall be entitled to discontinue such supply-

(a) If the owner or occupier of the property to which the supply is made has not alrelady given security, or if any security given by him has become invalid or insufficient, and such owner or occupier fails to furnish security or to make up the original security to a sufficient amount, as the case may be, within seven days, after the service upon him of notice from the licensee requiring him so to do or

(b) if the owner or occupier of the property to which the supply is made adopts any appliance, or uses the energy supplied to him by the licensee for any purposes, or deals with it in any manner, so as to unduly or improperly to interfere with efficient supply of energy to any other person by the licensee, or

(d) if the owner or occupier makes any alterations of, or additions to, any electric wires, fittings, works or apparatus within such property as aforesaid and does not notify the same to the licensee before the same are connected to the source of supply, with a view to their being examined and tested; (but the licensee shall re-connect the supply with all reasonable speed on the cessation of the act or default or both, as the case may be, which entitled him to discontinue it):

Provided, thirdly, that the maximum rate per unit of time at which the owner or occupier shall be entitled to be supplied with energy shall not exceed what is necessary for the maximum consumption on his premises, and, where the owner or occupier has required a licensee to supply him at a specified maximum rate, he shall not be entitled to alter that maximum, except after one month's notice in writing to the licensee, and the licensee may recover from the owner or occupier any expenses incurred by him by reason of such alteration in respect of the service-lines by which energy is supplied to the property beyond one hundred feet from the licensee's distributing main, or in respect of any fittings or apparatus of the licensee upon that property; and

Provided, fourthly, that (if any requisition is made for a supply of energy and) the licensee can prove, to the satisfaction of an (Electrical Inspector)-

(a) that (the nearest distributing main) is already loaded up to its full current-carrying capacity, or

(b) that, in case of a large amount of current being transmitted by it, the loss of pressure will seriously affect the efficiency of the supply to other consumers in the vicinity,

the licensee may refuse to accede to the requisition for such reasonable period, not exceeding six months, as such Inspector may think sufficient for the purpose of amending the distributing main laying down or placing a further distributing main.

(2) Any service-line laid for the purpose of supply in pursuance of a requisition under sub-clause(1) shall, notwithstanding that a portion of it may have been paid for by the person making the requisition, be (maintained by

the licensee who shall also have the right to use it for the supply of energy to any other person).

(3) Where any difference or dispute arises as to the amount of energy to be taken or guaranteed as aforesaid, or as to the cost of any service-line or as to the sufficiency of the security offered by any owner or occupier, (or as to the position of the meter board) or as to the improper use of energy, or to any alleged defect in any wires, fittings, works or apparatus, or as to the amount of the expenses incurred under the third proviso to sub-clause (1), the matter shall be referred to an (Electrical Inspector) and decided by him.

(4) Every requisition under this clause shall be signed by the maker or makers thereof and shall be served on the licensee.

(5) Every requisition under this clause, shall be in a form to be prescribed by rules under the Indian Electricity Act, 1910; and copies of the form shall be kept at the office of the licensee and supplied free of charge to any applicant."

7. This condition "2(j)" has been challenged on the following grounds:

(i) This condition which is not covered under clause VI of the schedule, cannot be framed by the Board. Clause VI of the Schedule is legislative enactment. This condition can only be framed by the State Legislature. As such, the Board has no power to frame such condition which is not covered under clause VI of the schedule.

(ii) The provisions of the second proviso to section 26 of the Supply Act lay down obligation on the Board to supply energy to any person who requires and say that the provisions of clause VI of the Schedule to that Act shall apply to the Board in respect of that area only where distribution mains have been laid by the Board and the supply of energy through any of them has commenced. There is an obligation on the Board to supply electric energy under section 3(2)(f) and section 22 of the Electricity Act read with clause VI of the schedule which forms part of the Act and under section 26 of the Supply Act, there is a provision for disconnection under clause VI of the schedule and under section 24 of the Electricity Act. There is no provision either in

section 24 or in clause VI of the schedule for disconnection of power for non-payment of dues of erstwhile consumer. Conditions can be varied or added only by State Government under section 2(3)(f) of Electricity Act read with sections 78 and 78-A of the Supply Act. As such pre-condition is illegal and ultra vires both the Acts. The Board cannot lay down any terms and conditions of supply which would dilute the Board's obligation to supply energy in terms of clause VI of the schedule. The condition that requiring requisitionist for supply of energy for any premises to clear dues of the previous owner or occupier of the premises is a new condition diluting the Board's obligation to supply energy as provided in clause VI of the schedule.

(iii) Such term cannot be framed against the provisions of the Supply Act and the Electricity Act in this behalf.

(iv) It is not a charge on the property. As BPMC Act provides that the tax on the premises will be realised even from the subsequent owner who purchased that property, but electrical charges on the person who consumes electric energy, not on the property.

(v) Such condition prohibits the business of the petitioner. Hence, it is against the fundamental rights of business under Article 19 of the Constitution of India.

(vi) The outstanding dues of the previous owner come within the contractual liability between the Board and the previous owner/ occupier and not against the third party as held by the Supreme Court in the case of Bihar State Electricity Board vs. M/s. Green Rubber Industries and others reported in 1990(1) SCC, 731. That relationship between the Board and the consumer is purely contractual which has been confirmed by the Supreme Court in the case of Isha Marble vs. Bihar State Electricity Board and another reported in 1995(2) SCC, 648. As the Board and the previous owner were party to the agreement for the supply of electricity to the previous owner, that obligation for the payment of dues of electric energy is only on the previous owner who consumed the electric energy, not on the subsequent owner/occupier who is not party to that agreement nor has consumed that electric

energy The Board cannot insist upon the petitioners for the payment of dues of electric energy consumed by the erstwhile consumer as condition precedent to provide electricity connection. The obligation of the previous owner cannot be enforced against the subsequent owner as there was no contract between the Board and the subsequent owner for the payment of the energy consumed by the previous owner/ occupier and that contractual liability cannot be enforced against the third party which was not a party to the contract by implementation of condition 2(j). It is just like a person who has eaten food and the charges to be recovered from a third party (subsequent owner/occupier who has not eaten food and has no concern with the food eaten.). The concept of contractual liability is like principle of natural justice. As such, such contractual liability cannot be enforced against the third party. The Board is required to frame conditions to protect the public revenue by making provisions of disconnection of supply as soon as the charges exceed the amount of deposit as security just like telephone bills. The Board can ask the consumer to deposit further security or to clear all the amounts of outstanding dues as soon as the amount of the dues exceeds the amount of security deposit. The Board if allows huge and large accumulation of arrears in lacs and lacs even in crores without resorting to recover either by disconnection of the supply of elegy under section 24 of the Supply Act or by requiring additional security from the consumer or by instituting legal proceedings against the consumer, the Board is responsible for its own sheer negligence and cannot fasten its own responsibility and negligence on the bonafide auction purchaser who is a third party, after several years.

(vii) Section 29(1) of the Gujarat State Regulatory Commission Act provides that notwithstanding anything in any other law, the tariff for supply of electricity grid, wholesale, bulk or retail, as the case may be, in a State shall be subject to the provisions of the ERC Act and shall be determined by the State Commission in accordance with the provisions of the ERC Act. After coming into force of the ERC Act, the Board has to approach the Gujarat Electricity Regulatory Commission for determination of its tariffs and

the commission has determined its Tariff Order. That tariff determined by the Commission does not contain any condition that if the previous owner or occupier of a given premises has defaulted in payment of the Board's charges for electricity, any subsequent owner or occupier thereof shall pay the said arrears for the grant of electrical connection to it.

(viii) Such condition no. 2(j) is violative of Article 14 of the Constitution of India on two grounds, namely (a) treating equals as unequals and (b) arbitrariness. Condition no. 2(j) has two parts. First part relates to the arrears of Board pending against the consumer or occupier. The second part requires the new successor or occupier to clear those dues of the previous consumer before the application for supply of electricity is processed. That amount of previous owner is required to be paid by the subsequent owner. If at a later stage, the Board gets the full amount or part amount of those dues from the previous owner, the amount is required to be refunded to the successor/occupier after adjusting the costs including legal expenses incurred in recovering such arrears and refund shall bear no interest. Thus, it is the entire discretion of the Board to recover that amount from the previous owner by filing a civil suit in the Civil Court. Costs of litigation including legal expenses are required to be deducted and no interest will be paid to the subsequent owner if the suit is decreed for that amount by the Civil Court and amount is recovered. It is also contended that the amount required to be deposited by the subsequent owner will be a forced loan refundable which is impermissible as held by the Supreme Court in the case of State of M.P. vs. Ranavji Raoji and another reported in AIR 1968, SC, 1053. When the petitioner society purchased the property in auction condition no. 2(j) was not in existence. That has been subsequently inserted in the conditions. The petitioner was not aware of the future amendment to be made and implemented. As such, the said condition is violative and not applicable to the petitioner society.

(ix) The Official Liquidator under the statutory orders sold the property in dispute in auction to the petitioner and that property was purchased by

the petitioner society. Before the Liquidator, the Board lodged its claim. As per the orders of the authority concerned, the amount has been received by the Board in respect of the same premises. The Board has not challenged in any court of law thatthe amount received by it is less amount. As such, under law, the Board will be deemed to have satisfied with that amount received by it in law. Now, the Board cannot again agitate the same and cannot insist the petitioner to deposit the remaining amount.

8. On the other hand, the learned Advocate General Mr. Shelat raised the following arguments on behalf of the State as well as Gujarat Electricity Board.
(i) Competence to frame regulations:

Regulation no. 2(j) is framed under the provisions of section 49 read with section 79(J) and (K) of the Electricity (Supply) Act. Section 49 makes provisions for the sale of electricity by the Board to any person other than the licensee subject to the provisions of the Act and regulations, if any, the Board is empowered to frame terms and conditions as the Board thinks fit for supply of electricity to any person not being licensee. Sections 79(J) and (K) provide for making a regulation inter alia in respect of principles governing supply of electricity by the Board to any person other than a licensee. Thus, the Board functions under the Act for which it considers necessary to make regulations and any regulation for function of the Board if considered to be expedient and necessary.

(ii). Nature of regulations framed under section 49 read with sections 79(J) and (K) of the Supply Act.

The regulation framed under section 49 read with section 79(J) are statutory in character and in nature of subordinate legislation. The learned Advocate General relied on the decision of the Supreme Court in the case of Hyderabad Vanaspathi Ltd. vs. A.P.S.E.B. reported in 1998(4) SCC, 470 wherein it is held that the terms and conditions are statutory in character. The conditions for supply are akin to susbordinate legislation. It is also further held that the terms and conditions are statutory in character and they cannot be invalidated if they are in conflict with any provisions of Electricity (Supply) Act or the Constitution. In the case of M/s. Nav Bharat Ferro Alloys Ltd. vs. A.P.S.E.B. and others reported in AIR 2002, AP, 493 it is held that terms and

conditions of supply-demanding surcharge for late payment and interest on delayed payment of outstanding dues are not ultra vires the Act nor arbitrary and unreasonable.

(iii) Whether Regulation is inconsistent or is in conflict with the provisions of the Act ?

The learned Advocate General has contended that clause VI of the schedule of the Act requiring the Board to supply energy is not exhaustive. In the case of Smt. K.S.Sushsila vs. Karnataka Electricity Board reported in AIR 1988, Karnataka, 178, it is held that conditions prescribed in clause VI of the Schedule are not exhaustive. They are basic conditions on the fulfillment of which supply of electricity should be given. In addition to that, section 49 empowers the Board to supply electrical energy upon such terms and conditions as the Board thinks fit. Condition no. 2(j) is a supplement condition to the conditions prescribed in clause VI of the schedule to the Act and that condition 2(j) cannot be said as inconsistent with the provisions of the Act and from the schedule itself. In the case reported in AIR 1993, SC, 2005 relying upon the case reported in AIR 1963, SC, 1128, the Supreme Court has held that section 49 is the provisions for the sale of electricity by the Board to the person other than licensee. Sub-section (1) of the said section commences from the words "subject to the provisions of this Act and of Regulations". This means that if there are any provisions regulating the Board in the matter of supplying electricity to any person not being a licensee then the supply by the Board will be subject to all these provisions. He also relied upon the case of M/s. Jagdamba Paper Industries Pvt. Ltd. and others vs. Haryana State Electricity Board and others reported in AIR 1983, SC, 1296 wherein it has been held as under:

"We are of the view that the Board has been conferred statutory power under section 49(1) of the Act to determine the conditions on the basis of which supply is to be made. This Court in the case of Bisra Stone Lime Company Ltd. vs. Orissa State Electricity Board (1976) 2 SCR, 307, (AIR 1976 SC,127) took the view that enhancement of rates by way of surcharge was well within the power of the Board to fix or revise the rates of tariff under the provisions of the Act. What applied to the tariff would equally apply to the security, that being a condition in the contract of supply. Each of the petitioning consumers had agreed to furnish security in cash for payment of energy bills at the time of entering into their respective supply agreements. There was no challenge in these writ petitions that the demand of

security at the time of entering into supply agreements has to be struck down as being without jurisdiction. Section 49(1) of the Act clearly indicates that the Board may supply electricity to any person upon such terms and conditions as the Board thinks fit. In exercise of this power, the Board had initially introduced the conditions regarding security and each of the petitions had accepted the term." Thus, the Supreme Court has found that the security deposit and interest on late payment or surcharge by way of penalty are not within the conditions mentioned in clause VI of the schedule, are not inconsistent with clause VI and they are supplementary to the conditions made in clause VI of the schedule. In the same manner, regulation 2(j) is in conformity with the provisions of the Act as well as the Regulations.

(iv) Whether the regulation so framed is irrational or arbitrary ?

The regulation by way of condition framed is in the nature of subordinate legislation and that cannot be challenged unless it is irrational or arbitrary. For this purpose, the learned Advocate General relied upon the decision of the Supreme Court in the case of M/s. Sharma Transport company vs. Government of A.P. reported in AIR 2002, SC, 322 wherein it has been held that in order to strike down a delegated legislation as arbitrary, it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The learned Advocate General has also relied upon the case of Maharashtra State Board of Secondary and Higher Secondary Education vs. Paritosh Bhupesh Kurmarsheth reported in AIR 1984, SC, 1543 wherein it has been held that the Court should not examine merits and demerits of a policy laid down by regulation making body. The question whether a particular piece of delegated legislation-whether a rule or regulation or other type of statutory instrument is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference only to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation etc. and also the object and purpose of the Act as can be gathered from the various provisions of the enactment. It is not for the Court to examine the merits or demerits of a policy laid down by regulation-making body because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation-making power conferred on the delegate by the Statute. Any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires

and the court cannot strike it down on the ground that in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purpose of the Act. He also relied on the decision of Andhra Pradesh High Court in the case of M/s. Nava Bharat Ferro Alloys Ltd. vs. APSEB, reported in 2002, AP, 493 in which it has been held that enactment cannot be struck down firstly the court thinks it is unjustified and unwise unless it is shown with satisfactory proof that injustice is prohibited or such rights protected by the constitution.

(v). Learned Advocate General submitted that Kerala High Court as well as Karnataka High Court have held that regulation 2(j) of the Regulations is para materia with regulation 15(c) framed by Kerala Electricity Board as legal and valid. In the case of Seena B. Kumar vs. Assistant Executive Engineer, Electrical Major Section, Mavelikkara and others reported in AIR 1998, Kerala, 343 has distinguished Isha Marble's case (supra) and has held that where an occupant is desirous of reconnection, he has to remit the entire arrears of charges and the dues in respect of the connection already given to the premises. After payment of the entire amount, the Board can give reconnection to a new consumer. It is also open to the Board to recover the amount through revenue recovery proceedings from the previous consumer, but on the recovery of the said amount, it should be refunded to the new consumer and such provision of regulation 15(E) of the Conditions was not available in Bihar Electricity Act. Hence, the Supreme Court has held that the electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. As the law as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. If such practice is permitted, it would permit dishonest consumers transferring their units from one hand to another from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. That question was again examined by Kerala High Court in the case of K.J. Dennis and etc. vs. Official Liquidator, Kochi and others reported in AIR 2001, Kerala 380 and has held that such regulation is not arbitrary or irrational. He also relied on the decision dated 19th July, 2000 of Karnataka High Court in writ petition being writ petition no. 31929 of 1994 in which

it has been observed that it cannot be said that regulation is either arbitrary or unconstitutional. The provision of regulation 4.34 is a reasonable restriction and such restriction has rational and reasonable nexus with the object to be achieved by the Board, namely, recovery of amounts due to it from the consumer of electricity and it was held that it can be said that the impugned provisions are intravires of the Act. Law was inadequate and hence Supreme Court has held otherwise in Isha Marble's case. (Supra).

(vi). The regulation is not discriminatory in character.

It has been contended by the learned Advocate General that the Board can refuse to grant supply to a premises where there are arrears of electricity charges. There is no classification. There is only one clause to which the regulation applies and it is not in violation of the provisions of Article 14 of the Constitution. The language of the provision of 2(j) is para material with Karnataka regulations and Kerala regulations wherein arrears of previous consumer in respect of the premises which was purchased by the subsequent owner, the charges which are being paid by the new consumer or successor are not treated to be fixed deposit till the charges are recovered. Hence, no question arises for payment of interest. As such, the regulations are reasonable and are not arbitrary as laid down by the Supreme Court in the cases reported in AIR 1984, SC 1543 and AIR 2002, SC, 322.

(vii) Whether the Electricity Regulatory Commission Act, 1998 excludes the power of the electricity Board to frame conditions for supply of electricity under section 49 read with section 79(J) ?

In this regard, the contention of the learned Advocate General is that sections 22 and 29 of the Electricity Regulatory Commission Act provide for determination of tariff by State Commission and the Commission is empowered only to frame tariff to the extent but the power to frame conditions for supply of electricity continues to be vested under the Electricity Board under section 49 read with section 79 of the Electricity (Supply) Act. He also relied on the decision of this Court in the case of Mardia Chemicals vs. GEB reported in AIR 2002, Gujarat, 318 wherein it has been held that so far as framing of tariff is concerned, the matter is now entrusted to the State Commission under the provisions of the said Act of 1998. However, the Board remains empowered to lay down terms and conditions for supply of electricity to any person under section 49 of

the Act of 1948. The Madhya Pradesh High Court has examined the same question in the case reported in AIR 2002, MP, 189 and has held that the Board can continue to exercise the powers vested in it and the only exclusion is about the fixation of tariff. Thus, the contention of the learned Advocate General is that the Board is not bound to supply electricity unless its terms and conditions are complied with. Any amount which is due or outstanding of the previous owner, taken by the Board is condition precedent for the supply of electricity to the subsequent owner. This is not a case of forced loan as the Board is bound to refund the same after adjustment of the expenses incurred for recovering the said amount.

9. I have heard the learned counsel for the respective parties at length and perused the pleadings and other relevant papers on record. At the outset, it is necessary to note as to what was the necessity to frame and incorporate condition "2 (j)" in the Conditions and Miscellaneous Charges for Supply of Electrical Energy. The respondent GEB thought it fit to frame this condition 2(j) for the reason that earlier occupier/owner who was liable and responsible for the outstanding dues of the energy consumed by him, sells his premises or his property to any person or it is sold in a public auction by any authority to any person for the recovery of loan amounts advanced by the financial institutions/banks to old owner/occupier and new occupier/owner comes into possession after purchase by him of that premises. He asks the GEB for a new connection. The Board says that unless the outstanding dues of the energy consumed by the earlier occupier are paid, no new connection can be granted to the new owner/occupier in respect of the same premises. The earlier occupier/owner has defaulted in making the payment of energy consumed by him. The subsequent owner/occupier says that he has is not responsible for the energy consumed by the earlier occupier as there is no contractual liability against him. The Board found itself in a dilemma as to how the dues could be recovered from him. The previous owner/occupier becomes out of picture or disappears after disposal of his property. If he is available that money can be recovered by the Board by instituting a civil suit. All of us know, how long such litigation would continue and what would be the fate of such litigation and new owner/occupier is not ipso facto responsible for the dues of the earlier owner/occupier due to contractual liability. When the dues can be recovered easily from the new owner/occupier if he applies for the new connection. If any condition is imposed for the recovery of the old dues from new occupier/owner, whenever he

applies for new connection. In this connection, the Supreme Court has made observations in the case of Isha Marbles vs. Bihar State Electricity Board reported in (1995) 2 SCC, 648 as under:

" 63. We are clearly of the opinion that there is great reason and injustice in holding as above. Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction-purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state, if we hold as we have done above, it would permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness."

As the matter before the Supreme Court was whether subsequent owner/occupier is liable for the payment of the dues of energy consumed by the earlier occupier/owner and the Supreme Court found that the law in this respect was inadequate, but it has not been directed by the Supreme Court that the said outstanding dues of the energy consumed by the earlier owner/occupier should be paid by the subsequent owner/occupier who has purchased that premises in public auction and is yet to be given connection to him. Defaulter and dishonest consumers have not been permitted to run away from their liability to pay arrears of the energy consumed by them. Electricity is public property. Said public revenue should not be permitted to remain unpaid. Dishonest consumers should not be
permitted to say that he is not responsible. Hence, the Board found it very easy to recover those dues from the subsequent owner/occupier by incorporating new condition 2(j) with effect from 10th August, 2001.

10. By means of these petitions, the validity
of this condition 2(j) has been challenged. The Supply Act gives out 5 types of provisions (1) the provisions of

the Act, (2) Rules (3) Regulations (4) terms and conditions and (5) policy of the State Government. Under section 49 of the Act it is provided that subject to the provisions of this Act and of regulations, if any made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Board thinks fit and may for the purposes of such supply frame uniform tariffs. It is also provided that in fixing the uniform tariffs, the Board shall not show undue preference to any person. Section 78 of the Supply Act empowers the State Government to make rules to give effect to the provisions of this Act, after previous publication, by a notification in the Official Gazette. Clause (h) of sub-section (2) of section 78 requires the rules which can be framed for conduct of the business of the Board upon which the local advisory committee is required to be consulted. Section 78 of the Supply Act says that in the discharge of its functions, the Board shall be guided by such directions on questions of policy as may be given to it by the State Government. Sub-section (2) of section 78-A requires that any policy can be framed by the State Government for guidance to the Board in discharge of its function and if any dispute arises between the Board and the State Government as to whether question is or is not a question of policy, it shall be referred to the Authority whose decision thereon shall be final. "Authority" has been defined under sub-section (1) of sub-section (2) of the Supply Act. "Authority" means Central Electricity Authority constituted under section 3. Section 3 requires that the Central Government shall constitute a body called the Central Electricity Authority generally to exercise such functions and perform such duties under the Act and in such manner as the Central Government may prescribe or direct and in particular enumerated therein. Section 79 has entrusted the Board with the power to make regulations by a notification in the official gazette not in consistent with this Act and the Rules made thereunder to provide for all or any of the matters given therein. The learned Advocate General emphasised that clauses (j) and (k) of section 79 of the Supply Act empower the Board to frame Regulations not inconsistent with the Act and Rules made thereunder regarding principles governing the supply of electricity by the Board to persons other than licensees under section 49 and any other matter arising out of the Board's functions under this Act for which it is necessary or expedient to make regulations. He further contended that condition 2(j) is a regulation framed by the Board under section 49(1) read with section 79 of the Supply Act though, in the counter-affidavit it is stated

that " the respondent submits that the respondent Board has, in exercise of the powers conferred in it under section 49 of the Electricity (Supply) Act, 1948 has framed its Conditions and Miscellaneous charges for supply of electrical energy and has incorporated additional condition 2(j) in the said condition, by giving a public notice also. The aforesaid public notice was given in leading newspapers for the information of the public at large. Therefore, as per condition no. 2(j), the application for reconnection or new connection from the successor/occupier of the premises where there are arrears of the Board pending from the previous consumer/occupier shall be processed only after the receipt of the full payment from such applicant against all accumulated dues of the predecessor auction holder."

The respondent no.1 has filed another affidavit-in-reply to the draft amendment filed by the petitioner wherein it is stated that section 79 of the Supply Act authorises the Board to make regulations by notifying the same in the official gazette not inconsistent with Electricity Supply Act, 1948 and the rules framed thereunder. Once such power is conferred to frame regulations governing supply of electricity by the Board to persons other than licensees under section 49 of the Act and in exercise of this power, the Board has framed condition no. 2(j) which authorises the Board to collect the outstanding arrears of electricity charges from a person who is desirous to have electricity for a premises for which the power supply agreement has been terminated and attached a copy of the notification published in the Gujarat Government gazette wherein it is stated in exercise of the powers conferred under section 49 of The Electricity (Supply) Act, 1948, Gujarat Electricity Board has incorporated additional condition no. 2(j) in its Conditions and Miscellaneous charges for supply of electrical energy, then condition 2(j) has been enumerated.

11. Now, let us know as to what is the difference between terms and conditions framed under section 49 and the regulations framed under section 79 of the Act, and their nature and character with their object. Under section 49 of the Supply Act, the Board is empowered to impose or fix such terms and conditions for the supply to any person not being a licensee if said conditions are not inconsistent with the provisions of the Act and of the Regulations, if any, made in this behalf. Thus, section 49 of the Act provides the character and status of Regulation framed under section 79 of the Supply Act equal to the provisions of the

Supply Act and uses the phrase "subject to the provisions of this Act and of regulations, if any, made in this behalf, the Board may supply electricity to any person not being a licensee upon such terms and conditions as the Bord thinks fit and may for the purposes of such supply frame uniform tariffs". Thus, sub-section (1) of section 49 of the Supply Act says that the terms and conditions to be imposed on any person for supply of electricity should be in conformity with the provisions of the Supply Act and Regulations, if any, made in this behalf. It appears tht the terms and conditions referred in section 49 of the Supply Act are not in statutory nature and they can be imposed by the Board on individual consumers for safety measures of the energy and for the benefit and interest of the Board. These terms and conditions are not as uniform as uniform tariffs referred in section 49(1) of the Supply Act and resriction has been imposed by the Legislature under section 49(4) that in fixing tariff and imposing terms and conditions for supply of power the Board shall not give any undue preference to any person. Hence, section 49 of the Supply Act does not require the notification of such terms and conditions framed under section 49 and it also does not require that such terms and conditions should be published in newspapers and should be notified in an official gazette whereas section 79 has entrusted the Board with the power to make regulations which are not inconsistent with the Act and Rules made thereunder and those regulations are required to be published by a notification in an official gazette. Thus, the terms and conditions framed under section 49 of the Supply Act are not required to be published in an official gazette while Regulations framed by the Board under section 79 of the Supply Act are required to be published by a notification in the official gazette. Thus, there is a clear demarcation between the terms and conditions framed under section 49 and the regulations under section 79 of the Supply Act. In the pleadings, by the Board in the affidavit-in-reply as well as the notification it is stated that condition 2(j) has been framed by the Board in exercise of the powers conferred under section 49 of the Supply Act. From the statutory provisions stated above, it appears that the condition 2(j) is nothing but a condition framed by the Board under section 49. Even if it has been notified in an official gazette, but the character cannot be changed as it is only a condition and not a regulation which is required to be framed under section 79 of the Act. Thus, condition 2(j) which does not fall within the ambit of regulations to be framed under section 79 of the Supply Act. The learned Advocate General has not produced regulations framed by the Board

under section 79 nor it has been pointed out from any material on record that condition 2(j) is a regulation framed under section 79 of the Supply Act. If such power to frame regulation has not been exercised under section 79, then that power cannot be exercised for making terms and conditions under section 79. That is only terms and conditions which are not required to be notified in the official gazette. In a case, the learned Single Judge of this Court directed the Chief Secretary of the State to appear in person in a bail matter before this Court. In an LPA filed by the State against that order, the Division Bench has held that the learned Single Judge cannot direct the Chief Secretary for appearance in the bail matter. That power can only be exercised under the provisions of Article 226 of the Constitution and the order of the learned Single Judge was quashed. Though the powers under Article 226 of the Constitution are exercisable by Learned Single Judge under the Rules of the Court. As such, the Board cannot issue or impose such condition 2(j) under the name of regulation framed under section 79 of the Act. Thus, the Board is incompetent to impose such condition in the name of the regulations. The Kerala High Court tried in giving harmonious construction of the Regulation framed under section 79 of the Supply Act and terms and conditions under section 49 of the said Act in the case of K.J.Dennis and others vs. Official Liquidato, Kochi and others (AIR 2001, Kerala, 380). "Regulations have been laid down under section 79(J) of the Electricity Supply Act. Regulation as made would form part of section 49 of the Electricity Act", but in view of object and nature of the terms and conditions stated above, I could not be pursuaded to agree with the view of the Kerala High Court. Regulations framed under section 79 of the Supply Act require statutory cover enumerated hereinafter.

12. Moreover, it is pertinent to note that every regulation framed under section 79 by the Board is required to be notified in an official gazette. The Parliament thought that the power for framing Regulation under section 79 of the Supply Act has been conferred to the Board and such regulation framed under section 79 of the Supply Act is statutory in nature. The Board may misuse this power by making regulations which may be injurious to and against the interest of the society, even against law and mere notification of such rgulation framed under section 79 of the Supply Act in the official gazette for the enforcement of such regulation is not sufficient, but such regulation should be approved by the State Legislature, as Board is constituted in a State under section 5 of the Suppy Act. Hence, the Parliament

introduced amendment in the Supply Act by inserting section 79-A in the Supply Act, and such rgulation is required to be placed before the State Legislature as required by section 79-A which says " every notification issued under section 55 by the State Government or the State Commission, as the case may be, every rule made by that Government under section 78 and every regulation made by the Board under section 79 shall be laid, as soon as may be, before the State Legislature." This new section has been inserted by Act 22 of 1998 with effect from 31st December, 1998. Thus, there is a statutory mandate for placing the regulation framed under section 79 before the State Legislature for the approval. If it is approved by the State Legislature, then it will be qualified as a regulation. But the regulation framed by the Board under section 79 will not be treated as a regulation under section 79 of the Act unless it is laid before State Legislature. The object of laying any statute on the floor of the Legislature is only to get approval of the House after discussion by the members therefore, it is not a mere formality. On this score, the learned Advocate General has not pointed out from any material nor has pleaded in the affidavits filed by the respondent GEB or State Government even in oral arguments that condition no. 2(j) framed by the Board under section 49 of the Supply Act was placed before the floor of the State Legislature for the approval as required under section 79A of the Electricity Supply Act. Thus, this condition 2(j) is incompetent and cannot be enforced as it has not been got approved from the State Legislature. Section 49 starts with the words " subject to the provisions of this Act and of regulations, if any made in this behalf", meaning thereby that any terms and condition framed by the Board for the supply of electricity to any person should not be inconsistent with the provisions of the Act and the regulations if any made in this behalf. As the regulation is statutory in nature as they have not been approved by the State Legislature under section 79-A, the terms and conditions framed under section 49 cannot be termed as regulation and cannot be enforced as regulations framed under section 79 of the Act. In absence of the approval by the State Legislature and those terms conditions framed under section 49 are required not to be inconsistent with the provisions of this Act. The learned Advocate General has not produced any material on record nor it has been produced before the Court that regulations were also framed under section 79 of the Supply Act. As such condition 2(j) cannot be termed as statutory in nature.

13. The learned advocate for the petitioners has

emphasised that condition 2(j) is inconsistent with the statutory provisions of law and against well known principles of law. Hence, it is unreasonable and irrational. In this respect, the learned Advocate General has contended that in order to strike down the delegated legislation as arbitrary, it is required to be established that there is a manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. Expression "arbitrary" means in an unreasonable manner as fixed or generally capriciously without adequately determining principles and not found in the nature of things nor rational or generally depending upon the will alone. He also contended that the Court should not examine merits or de-merits of a policy by regulation making body. The question whether a particular piece of delegated legislation whether a rule or regulation or other type of statutory instrument is in excess of the power of subordinate legislation conferred on the delegated body has to be determined with reference only to the specific provisions contained in the relevant statute conferring powers to make rule, regulation etc. and also object and purpose of the Act as can be gathered from the various provisions of the enactment. It is exclusively within the powers of the legislature and it is to determine as a matter of policy. How the provisions of a statute can best be implemented and all the measures substantiated as procedural to be incorporated in rules or regulations in efficacious achievement of the object and purpose of the Act. The court is not required to examine merits and demerits of the policy laid down by the regulation making body because its scrutiny has to be limited to the question as to whether regulation making power conferred with delegation by the statute. A policy incorporated in a rule or regulation will not be itself ultra vires and the Court cannot strike it down on the ground that it is not shown wise or prudent policy, but it is even a foolish one. In this regard, he relied on the case of Sharma Transport vs. Government of A.P. and others reported in AIR 2002, SC, 322, and on the decision of the Supreme Court in the case of Maharashtra State Board of Secondary and Higher Secondary Education and another vs. Paritosh Bhupesh Kumarsheth reported in AIR 1984, SC, 1543. He also relied on the case of M/s. Nav Bharat Ferro Alloys Ltd. vs. APSEN reported in AIR 2002, AP, 493 wherein the AP High Court has laid down as under:

"It is true that no enactment can be struck down by the constitutional courts just saying that in the opinion of the Court it is arbitrary or unreasonable. Although non-arbitrariness,

> reasonableness and fairness are postulates of Article 14 of the Constitution, when an enactment is sought to be struck down on the ground of arbitrariness and unreasonableness, the reviewing Court should find some or other constitutional infirmity before invalidating the enactment. An enactment cannot be struck down merely on the ground that the Court thinks it is unjustified and unwise. This position is fairly well settled by the decision of the Supreme Court in State of A.P. vs. Mc. Dowell and Company, AIR 1996, SC, 1627. It is not open to a Court to declare an enactment unconstitutional and void solely on the ground of unwise and harsh provisions or that it is supposed to violate some of the perceived natural, social economic or political rights of the citizen, unless it can be shown with satisfactory proof that such injustice is in fact prohibited or such rights guaranteed or protected by the Constitution."

14. On the other hand, the learned counsel for the petitioners pointed out that if rules and regulations or condition framed by the subordinate legislation are inconsistent with the statutory provisions of law or against the well known principles of law and if they are unreasonable and irrational, then it will amount to arbitrary legislation and that should be struck down. The learned counsel for the petitioners also pointed firstly that condition 2(j) is in two parts. First part provides that a new successor/occupier is required to pay arrears of electricity bills of the previous owner or occupier. The second part provides that refund of arrears of the previous consumer paid by the new requisitionist in the contingency and to the extent of the Board at a later date after getting full or part of the dues from the previous consumer without interest and after adjusting the costs including legal expenses to recover such arrears. The subsequent owner/occupier has not been given the power to recover the dues of the energy consumed by the earlier consumer. If he pays in advance, the Board has only a right to recover arrears from the previous consumer. It is the complete discretion of the Board to recover the amount of energy consumed from the earlier owner. If such amount whole or in part is recovered, the subsequent owner will be adjusted after adjusting the costs including the legal expenses to recover such arrears. Thus, the amount expended by the Board in recovering the amount from the earlier owner and that expenditure including the legal expenses will be deducted from the payment of refund to

the subsequent owner and the subsequent owner will also not get the interest on such amount. As such, the subsequent owner/occupier has no right to recover that amount from the person concerned. Secondly, he will have no right to get interest and legal expenses will be deducted. Thus, if any person deposits any amount, he would be the person to recover that amount from the person concerned. It is against general principles of law that subsequent owner/occupier is depositing the amount, but cannot recover that amount from the person concerned and it has been left open only to the Board to recover or not to recover. Even when it is recovered, then he would get no interest and he would get very less amount after deduction of the legal expenses. Thus, it is against the well settled principles of law. Secondly, under the second proviso to section 26 of the Supply Act, provisions of clause VI of the schedule to the Indian Electricity Act, 1910, are required to apply to the Board in respect to that area only where distribution mains have been laid by the Board and the supply of energy through any of them has commenced. Clause VI of the schedule mandates the licensee Board to supply energy on the application within one month from making of the requisition except in the natural calamity by which the Board has been prevented from doing so. Under section 26 of the Supply Act, the Board has been fastened obligation as per clause VI of the schedule. The Supreme Court in the case of Isha Marble (supra) has held in para-10 that the Board is under statutory obligation to supply electrical energy to any person whenever a requisition is made subject to the fulfillment on conditions under clause VI of schedule I of the Electricity Act. As per condition 2(j), the petitioner is required to deposit the arrears of the energy consumed by the earlier occupier or owner and such condition is not provided under clause VI of the schedule. Such obligation of the Board under section 26 of the Supply Act will be mitigated or diluted if said condition 2(j) is applied and that mandate can be mitigated and diluted only by the State legislative amendment to section 26 of the Supply Act and not by any Government order or condition of supply under section 49 of the Supply Act. Thus, the Board cannot lay down any terms and conditions of supply which would dilute the Board's obligation to supply energy in terms of the clause VI of the schedule. In this respect, the learned Advocate General has contended that condition under clause VI of the schedule no doubt, is obligatory, but it is not exhaustive. Various conditions have been made regarding security, additional security and payment of interest, surcharge and amount of penalty which are not subjects of clause VI of the schedule but they are

supplementary to the conditions mentioned in clause VI of the schedule. Various courts have held imposition of security, additional security and interest on late payment of charge, surcharge and payment of penalty as legal. Hence, the obligation under clause VI of the schedule can be exercised subject to other provisions also.

15. I have considered this contention advanced by the learned Advocate General and it does not appear to be genuine, as there is an obligation on the Board at initial stage to supply electrical energy under section 3(2)(f) and 22 of the Electricity Act and 2nd proviso to section 26 and clause VI of the schedule of the Supply Act to any person (not the premises) who requires for supply of electricityby making an application as held by the Supreme Court in the case of State of U.P. vs. Hindustan Aluminium Corporation (1979) 3 SCC, 229. Such additional condition cannot be imposed and such condition is not consistent with clause VI of the scheduleas such condition is not in consonance with the provisions of the Act and Rules or Regulations framed in this behalf having statutory force, after 31.12.1998 having been approved by the State Legislature as per requirement under section 79A of the Supply Act. On additional reasons, this additional condition 2(j) is arbitrary as inconsistent with the statutory provisions of law and well settled principles of law on the following reasons.

(i) Electricity dues by the previous owner/occupier is a contractual liability between the previous owner/occupier and the respondent Board. It is not statutory in nature since electricity is consumed by the consumer on the basis of a written contract prescribed in form ED-17 approved by section 26 of the Act. Hence, the petitioner cannot be held liable for any default committed by the previous consumer. Madhya Pradesh High Court in the case of National Textile Corporation(MP) Ltd. vs. MP Electricity Board reported in AIR 1980, MP, 32 has held that any liability of a former owner or National Textile undertaking prior to the appointed day cannot be fastened on the successor by mere inference. Hence, the liability to pay electricity dues is obviously fastened only to the consumer. In the present petition, the petitioner is not consumer, it is yet to receive electric connection. The Supreme Court in the case of Bihar State Electricity Board vs. Green Rubber Industries and another reported in 1990(1) SCC, 731 has held that the relationship between the Board and consumer is purely contractual. Thus, the Board cannot insist upon the petitioner to pay arrears owed by erstwhile consumer as a condition precedent to provide electricity

connection.

(ii) There is an obligation under section 3(2)(f), and section 22 of the Electricity Act and second proviso to section 26 of the Supply Act read with clause VI of the Supply Act and that clause VI of the schedule contains a condition under which supply can be disconnected. Condition mentioned in clause VI is exhaustive for grant of connection for supply of energy to any person but not exhaustive for continuance of energy which is subject of Regulation under section 79 of the Supply Act. Those conditions do not stipulate that initial supply will not be made or discontinued unless arrears of electricity

owed by the erstwhile consumer in the premises are not paid first. Thus, such a pre-condition is illegal and ultra vires the Act.

(iii) Such condition is also unreasonable in view of the fact that some times, identity of the premises where electricity was consumed by the earlier occupier or owner cannot be made. For instance, in a multistoreyed building occupant of 5th floor dies and building collapsed in earthquake. The building is again raised, can 5th floor of the new building be identified as the same premises for the purpose of implementation of the condition (2J). The answer would be "no". As such, there may be an existence where identity of a person or identity of the premises cannot be fixed and such amount cannot be realised from a new occupier. Thus, this condition would be illegal and arbitrary in that respect also.

(iv) It is not a charge on the property. It is a charge on the person who enters into an agreement with the Board and consumed energy. The subsequent owner/ occupier cannot be held responsible for the dues of the energy consumed by the earlier owner.

(v) This condition "2J" does not give right to the new owner/occupier to recover the arrears of previous owner/occupier. Provision of refund is practically futile due to uncertainty. Pre-condition of deposit of arrears of previous owner/occupier is nothing but forced loan which has been condemned by the Supreme Court.

(vi) Thus, this condition 2(j) is inconsistent with the statutory provisions of contractual liability under the provisions of Contract Act and Specific Relief Act.

Moreover, this condition has not been framed under regulations approved by the State Legislature under section 79-A of the Act. Hence, this condition lacks legal sanctity and is against the statutory provisions of both the Acts as in the Electricity Act and the Supply Act, there is no provision for the recovery of dues of earlier owner/occupier from the third party who has no concern.

16. As held above, this condition 2(j) is unreasonable, irrational and against well known principles of contractual liability made under the Contract Act and ultra vires and has no legal sanctity, hence, is liable to be struck down.

17. So far as the contention raised by the learned Advocate General that it is statutory in nature, supported by decisions of Kerala and Karnataka High Courts, is concerned, in my view, they are not applicable to the facts of the present case in view of the fact that the conditions framed under Regulations in those States might have been approved by the State Legislatures and those conditions might have been framed in accordance with law and approved by the State Legislature. But in the present case, this condition 2(j) does not come within the purview of the regulation. Secondly, it is not approved by the State Legislature and such condition cannot be said to be statutory in nature.

18. In addition to the discussion made above, such condition 2(j) is not applicable and sustainable in the eye of law to the petitioner of Special Civil Application no. 9032 of 2002 inasmuch as the petitioner of Special Civil Application no. 9032 of 2002 is also entitled to the reliefs as claimed in the petition on the additional ground that the petitioner purchased the property in a public auction held under the orders dated 20.9.2000 of the Learned Judge of this Court in Special Civil Application no. 1178 of 1998. By the order of this Court, a committee was appointed for the disposal of the property and the Joint Director of Kutir Gram Udyog was appointed as Chairman of that committee. Liquidator appointed under the guidance of the Committee sold the property in a public auction and the petitioner society purchased that property. There was a total liability of Rs. 46,08,152,73/-. Though the Liquidator appointed under the statutory provisions of law realised Rs. 13.25 crores only out of the sale proceeds of the property. The Registrar, Co-operative Societies, in exercise of his powers conferred under Co-operative Societies' Act issued a circular dated 5.3.1993 and took a policy decision as

to how payments are to be made to the creditors out of the sale considerations. The respondent no.1 GEB has lodged a claim about arrears of dues before the Liquidator. It is stated by the Liquidator by filing an additional affidavit in the aforesaid petition that the total claim lodged by GEB was Rs.5,75,57,299.29 ps. and out of the said total claim, proportionate sum of Rs.2,23,80,643/- was paid to the GEB towards its claim. As the claim was lodged and in accordance with law, proprtionate claim has already been satisfied by the Liquidator under the statutory provisions of law, it will be deemed that GEB's claim has been fully satisfied under the law and no amount can be required by GEB from the petitioner. If GEB had any more claim or had any grievance that GEB has received less amount, it could have challenged before the Court of law that it has received less amount which is not in satisfaction of its entire dues. As that amount has not been challenged by the GEB in any manner, the GEB will be deemed to have satisfied with the amount taken from the Liquidator in law and that amount will be deemed to have been made in satisfaction of the entire claim. GEB is now not entitled or even empowered to recover any more amount from the petitioner by way of condition no. 2(j).

19. In some of the petitions, the petitioners have not expressly challenged the vires of the condition no. 2(j) but they are also entitled for the relief as the condition 2(j) is not sustainable in law.

20. Accordingly, all the petitions are allowed. Condition no. 2(j) inserted in Conditions and Miscellaneous Charges for Supply of Electrical Energy with effect from 10th August, 2001 is hereby declared as illegal, unreasonable, arbitrary, ultra vires and against the provisions of law and is hereby struck down. The respondent GEB is directed to forthwith give electric connection to the petitioners without charging outstanding arrears of earlier owner/occupier. Rule made absolute accordingly in each of the petitions, with no order as to costs.

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21. After pronouncement of the judgment, the learned counsel for the respondent GEB prays that the implementation of this judgment be stayed for a period of one month for approaching higher forum. Considering the facts and circumstances, I do not find any good reason to accede to the request made by the learned counsel for the respondent Board. Hence, the request is rejected.

(Kundan Singh,J)

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